83-1072

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERMAN S. SOLEM, WARDEN,
~~SOUTH DAKOTA STATE PENITENTIARY~~; and
MARK V. MEIERHENRY, ATTORNEY GENERAL
STATE OF SOUTH DAKOTA,

Petitioners,

v.

DENNIS LUFKINS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MARK V. MEIERHENRY
ATTORNEY GENERAL

Mikal Hanson
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-3215
Counsel for Petitioners

QUESTION PRESENTED

WAS IT CONSTITUTIONALLY NECESSARY FOR THE FEDERAL COURTS TO ORDER THE STATE TO HOLD A NEW TRIAL INSTEAD OF A NEW FULL AND FAIR VOLUNTARINESS HEARING?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Solem and Meierhenry and Respondent Lufkins have been the parties to this action in both the District Court and the Court of Appeals. The Petitioners represent the State of South Dakota, and will hereafter be referred to as the "State." Respondent Lufkins will hereafter be referred to as "Lufkins."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the United States District Court for the District of South Dakota is reported at 554 F. Supp. 988, and appears in the Appendix pp. A-1 - A-33. The District Court's Order dated January 10, 1983, appears in the Appendix pp. A-34 - A-35.

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at the following citation: Lufkins v. Solem, et al., 716 F.2d 532 (8th Cir. 1983). The opinion of the Court of Appeals also appears in the Appendix pp. A-36 - A-37. The Judgment of the Court of Appeals, dated September 12, 1983, appears in the Appendix at pp. A-78 - A-79.

Finally, the State's Petition for Rehearing and supporting Affidavits appear

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERMAN S. SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY; and
MARK V. MEIERHENRY, ATTORNEY GENERAL
STATE OF SOUTH DAKOTA,

Petitioners,

v.

DENNIS LUFKINS,

Respondent.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on September 12, 1983. The Order denying the

State's Petition for Rehearing was entered October 19, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Testimony presented at trial established that Petitioner, the victim Sylvester Johnson, Eugene Hedine, Ruth Titus, Mathew Blue Dog and Ernest Hayes spent most of December 4, 1979, at Hayes' residence in Sisseton, South Dakota, engaging in partying and drinking. According to the State's eye witnesses, there was an argument about drinking between the victim Johnson and Lufkins which resulted in Sylvester Johnson being clubbed on the head with an ax handle.

Johnson apparently died while being driven to a hospital by Ernest Hayes. Mr. Hayes aborted his drive to the hospital and left the decedent on a church lawn. There the body was discovered on December 5,

1979. An autopsy determined that the victim's death was caused by a subdural hematoma, consistent with trauma inflicted by a blunt instrument.

Investigation in the matter led to Lufkins who had commenced serving a sixty (60) day sentence for DWI. He was therefore incarcerated at the time the police came to question him concerning the death of Sylvester Johnson. Testimony and exhibits at trial clearly established that prior to questioning, Lufkins was informed of his legal rights and he signed two statements of waiver of Miranda rights. Lufkins then signed a statement indicating that he had hit Johnson during the party.

B. PROCEDURAL HISTORY

Prior to his trial on First Degree Manslaughter and Habitual charges, Lufkins personally filed with the Court a hand written list of objections to the proceedings

against him. He stated that he had not hit the decedent, that the officers had told him that "things would go easy for him" if he signed an incriminating statement, that the officers were "hollering at him," and that his state of mind was not clear when he signed the statement. Lufkin's counsel, however, made no pretrial motion to suppress the statement.

Lufkins' trial began June 30, 1980, wherein Ernest Hayes, Eugene Hedine and Mathew Blue Dog testified that Lufkins had hit the victim with an ax handle. Additionally the State, through the testimony of Sheriff Long, introduced Lufkins' confession and the evidence surrounding its voluntary taking. Sheriff Long's testimony was taken during the course of the trial, in open court, before the jury. Lufkins' trial counsel did not request any independent voluntariness hearing outside the jury's

presence. Sheriff Long's testimony that the statement was voluntarily given was elicited during the State's case in chief. During this testimony, Lufkins rose to his feet and challenged the sheriff's veracity. After Long finished his direct testimony, Lufkins' trial counsel objected to the admission of Lufkins' statement on voluntariness grounds. The Judge overruled the objection and admitted the statement into evidence. Subsequently, Sheriff Long was cross-examined in regard to this statement, and Agent Peterson presented corroborating testimony regarding the voluntariness of the statement. Lufkins was never given an opportunity to present rebuttal evidence prior to the statement being admitted.

On July 1, 1980, the Roberts County jury entered a verdict of guilty against Lufkins. Following his conviction of First Degree Manslaughter, Lufkins pled guilty to Habitual

Offender charges; whereupon he was sentenced to life imprisonment.

On direct appeal, the South Dakota Supreme Court rejected all of Lufkins' claims and affirmed his conviction. State v. Lufkins, 309 N.W.2d (S.D. 1981). At no time was the State Supreme Court presented the issue of whether or not Lufkins had received a full and fair voluntariness hearing. The only issue raised before the South Dakota Supreme Court was whether Lufkins was denied due process of law by the admission of his incriminating statement without a prior determination of its voluntariness outside the presence of the jury. The lower District Court, sua sponte, raised the issue of whether or not Lufkins received a full and fair voluntariness hearing.

Subsequently, Lufkins filed a Writ of Habeas Corpus in Federal District Court. The

District Court, following an evidentiary hearing issued a Memorandum Opinion granting Lufkins a new voluntariness hearing. The Lower District Court claimed to have based its decision on Jackson v. Denno, 378 U.S. 368 (1964).

Secondly, the District Court concluded that Lufkins was denied effective assistance of counsel[1] because:

1. Lufkins' trial counsel failed to mount any challenge to the voluntariness of Lufkins' inculpatory statement.

2. Lufkins' trial counsel had not sequestered the State's eye witnesses.

3. Lufkins' trial counsel had bolstered testimony of one of the State's witnesses.

On appeal the Eighth Circuit agreed with the District Court and upheld the District Court's Order granting Lufkins a Writ of

---

[1] Entitling him to a new trial.

Habeas Corpus. In its opinion the Eighth Circuit concurred with the Lower District Court's decision that the procedures employed by the State trial court fell short of satisfying the due process standards enumerated in Jackson v. Denno, supra.

Additionally, the Eighth Circuit interpreted this Court's holding in Pinto v. Pierce, 389 U.S. 31 (1967), to require a defense counsel to specifically consent to the jury's presence, before a voluntariness hearing can be held with the jury present.

Finally, the Eighth Circuit agreed with the Distrcit Court that the trial counsel rendered ineffective assistance of counsel by failing to mount a legal attack on Lufkins' inculpatory statements, and that such failure prejudiced Lufkins' defense. The Eighth Circuit also agreed that Lufkins' trial counsel's ineffectiveness entitled him to a new trial. In so finding, it dismissed this

Court's holding in Jackson v. Denno, supra, and Pinto v. Pierce, supra, and accepted the rationale of the concurring opinion of Justice Fortes in Pinto v. Pierce, supra at 33-34. That rationale being that the failure to have the jury excluded significantly vitiated the jury's ability to make its own independent judgment as to the voluntariness of the statement for purposes of evidentiary acceptability, credibility and weight.

Following the issuance of the Eighth Circuit's Judgment, filed September 12, 1983, the State Petitioned for Rehearing based upon the Court of Appeals erroneous finding that Lufkins' trial counsel failed to sequester the State's eye witnesses. To support this finding the State submitted four Affidavits from individuals who were present during Lufkins' trial; all of whom stated and affirmed that the State's witnesses were sequestered during the trial.

On October 19, 1983, the Eighth Circuit denied the State's Petiton for Rehearing. The State then initiated this appeal.

REASONS FOR GRANTING PETITION

I

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

For purposes of this Petition for Writ of Certiorari, the State will admit that Lufkins did not receive a full and fair voluntariness hearing and that such a hearing should be conducted by the State. The sole question the State presents to this Court on appeal is whether or not the Federal Court Order requiring the State to conduct a new trial was proper, or did such an Order conflict with the applicable decisions of this Court.

The Eighth Circuit Court of Appeals ordered a new trial based on its Conclusion

of Law that Lufkins' trial counsel was ineffective. That conclusion was based on three findings:

1. Lufkins' trial counsel failed to mount any challenge to the voluntariness of Lufkins' inculpatory statements;

2. Lufkins' trial counsel did not sequester the State's witnesses; and

3. Lufkins' trial counsel bolstered the testimony of one of the State's witness.

To succeed on a claim of ineffective assistance of counsel Lufkins must not only show that his trial attorney failed to exercise the customary skill and diligence that a reasonable competent attorney would perform under similar circumstances, but he must also show that he was materially prejudiced in the defense of his case by the actions or inactions of his attorney. Morrow v. Parratt, 574 F.2d 411, 412, 413 (8th Cir. 1978).

The Eighth Circuit Court of Appeals concluded that Lufkins should have received a full and fair voluntariness hearing, and that it was ineffective assistance of counsel for his trial counsel not to request such a hearing. The State would submit that if a new full and fair voluntariness hearing is held, and Lufkins' statements are found to be voluntary, it is obvious that Lufkins has suffered no prejudice in the failure of his original trial counsel to request such a hearing.

To restate this argument, if Lufkins' statements are found to be voluntary at a new and fair voluntariness hearing, this Court cannot accept the Eighth Circuit Court of Appeals' finding that the failure of Lufkins' trial counsel to mount a challenge to Lufkins' statement was prejudicial to his right to a fair trial. If the statements are found to be voluntary, it was not prejudicial

for Lufkins trial counsel not to request a voluntariness hearing. Thus, Lufkins fails to prove the second prong of the two-prong test established in Morrow v. Parratt, supra.

Of course, if the State Court, in a new full and fair evidentiary hearing, determines that Lufkins' confession was involuntary, there must be a new trial on the guilt or innocence of Lufkins without the confession being admitted into evidence. This is exactly the procedure granted Jackson by this Court in Jackson v. Denno, supra. This court stated in Jackson:

> If at the conclusions of such an evidentiary hearing in the State Court on the coercion issue, it is determined that Jackson's confession was voluntarily given, admissible in evidence, properly to be considered by the jury, we see no constitutional necessity at that point for proceeding with a new trial, for Jackson has already been tried by the jury with a confession placed before it and has been found guilty.

Jackson v. Denno, supra, at 394.

To refute this argument the Eighth Circuit of Appeals discusses two other purported facts which demonstrate that Lufkins' trial counsel was ineffective. The first alleged fact was that Lufkins' trial counsel failed to sequester the State's three eye witnesses. In its original brief to the Eighth Circuit on page 22, and in its Petition for Rehearing the State unsuccessfully, but truthfully argued, that the record was void of any indication of whether the State's witnesses were sequestered or not. The Lower District Court's finding that they were not sequestered was based on pure speculation and conjecture.

The State in its Petition for a Rehearing submitted Affidavits from the State's Attorney (who prosecuted the case), the Clerk of Courts (who was present during the case), the Sheriff (who provided security during the court proceedings), and a court reporter (who

recorded Lufkins' trial)--to confirm that the three eye witnesses of the State were sequestered and not present in the courtroom during each others testimony. See Appendix pp. A-82 - A-90. Obviously, based on the void record and these Affidavits, this Court must dismiss the claim by the Lower Federal Courts that the State's witnesses were not sequestered.

The third claim of ineffectiveness concerns an allegation that Lufkins' interests were undercut by his trial counsel's statement which supposedly bolstered a State's witnesses. This claim is based on such an insignificant incident as to be clearly harmless. The alleged improper remark is found in the trial transcript on page 102. On cross-examination Lufkins' trial counsel stated:

> Actually, Mr. Peterson [State Division of Criminal Investigation

> agent], there isn't any question about your experience or working for the Attorney General's Office. I have known you for a long time.

Obviously this statement does not in and of itself create reversible error and can be interpreted to mean that Lufkins' trial counsel knew Mr. Peterson and knew that he worked for the Attorney General's Office. To interpret it as a statement bolstering Mr. Peterson's testimony is indicative of the way that the lower Federal Courts have searched the record to find anything which could support their shaky conclusion that Lufkins was denied effective assistance of counsel.

Once the previous section's erroneous finding is thrown out and the insignificance of the Lufkins' trial counsel's statement is weighed, it is clear that the only legitimate ineffective assistance of counsel claim is that Lufkins' trial counsel failed to request a voluntariness hearing.

As was outlined previously, if in a new voluntariness hearing the inculpatory statements are found to be voluntary, it was not prejudicial error for his original trial counsel not to institute procedural challenges against them.

Finally, the State would submit that the remedy in Jackson v. Denno, and Pinto v. Pierce, was intended to cover the factual situations presented by this case and rejects the Eighth Circuit's finding that Justice Fortes' concurring opinion in Pinto v. Pierce supplies the proper legal authority in regard to this issue.

The majority of this Court, unlike Justice Fortes, does not believe that the jury's function is reduced to an echo when it is present and hears the evidence submitted in regard to the admissibilty or inadmissibility of a confession. If that were the

case, this Court in Jackson v. Denno and Pinto v. Pierce would necessarily have ordered those individuals to receive a new trial. The Eighth Circuit incorrectly applied the insights of Justice Fortes instead of the holdings of this Court to this present case and therefore the State appeals to this Court for relief.

II

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH OTHER COURTS OF APPEAL ON THE SAME MATTER.

The Eighth Circuit Court of Appeals has concluded that Pinto v. Pierce, supra, stands for the proposition that if a defense counsel waives objection to the jury's presence, then no claim can be made that a voluntariness hearing in the jury's presence is unfair or violates a defendant's due process. Conversely, the Eighth Circuit stated in this case that it believes that Pinto explicitly

recognizes that if there is no waiver, it is a violation of due process to hold the hearing in the jury's presence.

This interpretation, the Eighth Circuit itself recognizes in Footnote #2, is in conflict with other applicable decisions of Federal Appeals Courts on the same matter. As the Eighth Circuit points out in Footnote #2, several Federal Appeals Courts have read Pinto to require a waiver of objection of the jury's presence. See United States ex rel. Hickman v. Sielaff, 521 F.2d 378, 379-80 (7th Cir. 1975); Lindsey v. Craven, 521 F.2d 1071, 1072-73 (9th Cir. 1975); Gladden v. Unsworth, 396 F.2d 373, 375 (9th Cir. 1968); cf. United States ex rel. Bennett v. Rundle, 419 F.2d 599, 605 (3rd Cir. 1969).

Conversely, the Fifth Circuit Court of Appeals has interpreted Pinto as saying that regardless of an expressed waiver, the jury's

presence does not violate due process when the confession is proven to be voluntary. See Martinez v. Estelle, 612 F.2d 173, 177 (5th Cir. 1980).

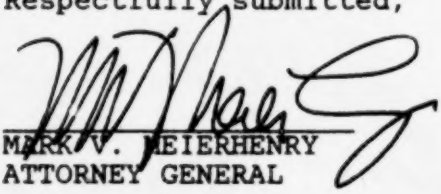
Because the decision of the Eighth Circuit Court of Appeals and the Fifth Circuit Court of Appeals are in direct conflict on the same issue of law, this Court should grant the State's Petition in order to review the question presented herein.

CONCLUSION

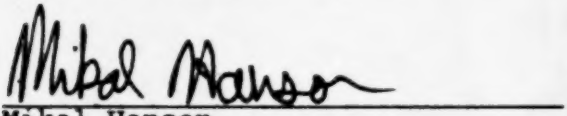
Based on the foregoing arguments and authorities, Petitioners Herman S. Solem, Warden, South Dakota State Penitentiary, and Mark V. Meierhenry, Attorney General for the State of South Dakota, pray that their Petition for Writ of Certiorari to the United

States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,



MARK V. MEIERHENRY
ATTORNEY GENERAL



Mikal Hanson
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-3215

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

Donald J. Porter
U.S. District Judge
Rm. 413 - U.S. Courthouse
Pierre, South Dakota 57501

January 10, 1983

Richard P. Tieszen
DUNCAN, OLINGER, SRSTKA, LOVALD
& ROBBENNOLT, P.C.
P.O. Box 66
Pierre, South Dakota 57501
Attorneys for Petitioner

Mark V. Meierhenry, Attorney General
Mikal Hanson, Assistant Attorney General
State Capitol
Pierre, South Dakota 57501
Attorneys for Respondents

RE: CIV. NO. 81-3060
DENNIS LUFKINS, Petitioner
vs.
HERMAN SOLEM, WARDEN; MARK V. MEIERHENRY, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA, Respondents

Dear Counsel: MEMORANDUM OPINION

Petitioner Dennis Ray Lufkins was convicted of voluntary manslaughter on July 1, 1980, in the Fifth Judicial Circuit Court of

South Dakota. He is currently serving a term of life imprisonment in the South Dakota State Penitentiary. He has applied to this Court for a writ of habeas corpus as provided by 28 U.S.C. § 2254 and § 2241(c)(3). Petitioner contends that his Fourteenth Amendment rights to due process of law were violated by the procedures used to determine the voluntariness of a statement given by him to law enforcement authorities and that he was denied effective assistance of counsel at trial in violation of the Sixth Amendment. Having reviewed all the files and records of petitioner's state criminal case, and based further on its own evidentiary hearing, this Court determines that petitioner's rights under the United States Constitution have been violated.

FACTS AND PROCEDURE

A drinking party on December 4, 1979, at the residence of Ernest Hayes in Sisseton,

South Dakota, culminated in the death of one of the participants, Sylvester Johnson. Clubbed in the head with an axe handle, Johnson died apparently while being driven to a hospital by Ernest Hayes. Mr. Hayes aborted his drive to the hospital and left the decedent on a church lawn. There the body was discovered on December 5, 1979. An autopsy determined that the victim's death was caused by a subdural hematoma, consistent with trauma inflicted by a blunt instrument.

On January 31, 1980, petitioner signed an inculpatory statement provided by Sisseton County Sheriff Neil Long and Division of Criminal Investigation Agent Delbert Peterson. Petitioner was, at that time, nine days into a sixty-day jail term in the Roberts County jail for DWI. On April 21, 1980, petitioner was arraigned on both first-degree manslaughter and habitual criminal

informations.[1] Petitioner pled not guilty to both charges.

On June 2, 1980, petitioner changed his plea to guilty to the manslaughter charge, bringing to a halt a jury trial then underway. Petitioner filed with the trial judge a handwritten list of objections to the proceedings against him. On June 12, 1980, the trial judge refused to accept petitioner's

---

[1] Petitioner has been convicted of at least one other felony. Under South Dakota's "habitual offender" statute, a defendant with a history like petitioner's, i.e., "one who has been convicted of one or two prior felonies," shall, upon conviction of another felony, have the sentence for the principal felony enhanced "by changing the class of the principal felony to the next class which is more severe." SDCL § 22-7-7. First degree manslaughter is a Class 1 felony in South Dakota. SDCL § 22-16-15. The maximum penalty for a Class 1 felony is life imprisonment and a $25,000 fine. SDCL § 22-6-1(2). The only class more severe than Class 1 is Class A. Class A felonies carry the penalty of mandatory life imprisonment with a potential for the imposition of the death penalty. SDCL § 22-6-1(1).

guilty plea and rescheduled his trial. Petitioner's two-day trial began June 30, 1980. Ernest Hayes, Eugene Hedine and Matthew Blue Dog testified that they spent December 4, 1979, drinking wine and rubbing alcohol with petitioner, Ruth Titus and the victim. All testified that petitioner hit the victim with an axe handle. Petitioner's incriminating statement was also received in evidence. Petitioner's sister testified that petitioner had been at her home from December 4 to December 5. Following his conviction of first degree manslaughter, petitioner pled guilty to the habitual offender charge, whereupon he was sentenced to life imprisonment.

On appeal, the South Dakota Supreme Court resolved five issues against petitioner and affirmed his conviction. State v. Lufkins, 309 N.W.2d 331 (S.D. 1981). Included among these issues were the claim that

petitioner was denied due process of law by the admission of his incriminating statement without a prior determinaton of its voluntariness and the claim that petitioner was denied effective assistance of counsel. Id. at 333.

Petitioner filed in this Court for a writ of habeas corpus. This Court received briefs from both sides and directed the expansion of the record to include transcripts of proceedings in state court. 28 U.S.C. § 2254 Rule 7. Determining that petitioner's claim could not be resolved on the basis of the expanded record alone, id Rule 8, this Court convened an evidentiary hearing on September 27, 1982.

EXHAUSTION OF STATE CLAIMS

The United States Supreme Court has ruled that habeas petitioners must completely exhaust state remedies before asking a federal court to hear their claims. Rose v.

Lundy, ___ U.S. ___, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). As stated above, the South Dakota Supreme Court ruled on both claims presented in petitioner's habeas petition when it decided his appeal from conviction.

The exhaustion requirement is a rule of comity designed to prevent undue friction between state and federal courts. The requirement is satisfied when the federal claim has been fairly presented to the state courts. Picard v. Connor, 404 U.S. 270, 275 (1971). The claim presented to the federal court must be the same as the claim presented to the state court. Id. at 276. There is no requirement that the state court have more than one opportunity to rule on the claim. Thompson v. White, 661 F.2d 103, 106 n.6 (8th Cir. 1981); Mucie v. Missouri State Dept. of Corrections, 543 F.2d 633, 636 (8th Cir. 1976). Once Petitioner has brought his claim

to the highest state court, and that court has passed on the claim, a federal court may hear petitioner's application for a writ of habeas corpus. Brown v. Allen, 344 U.S. 443, 448 n.3 (1953); Irby v. Missouri, 502 F.2d 1096, 1098 (8th Cir. 1974); Maggitt v. Wyrick, 533 F.2d 383 (8th Cir.), cert. den., 406 U.S. 909 (1971).

Petitioner has presented to the Supreme Court of South Dakota both claims in his writ of application. The Supreme Court has denied him relief from each claim. Since the highest court of South Dakota has ruled on petitioner's claims, petitioner has satisfied the exhaustion requirement, and his petition is properly before this court.

VOLUNTARINESS OF ADMISSION

A federal court hearing a state prisoner's petition for a writ of habeas corpus is not convened to retry the petitioner's case or to decide issues of state law. It

has as its limited but important function to ensure that petitioner, in his trial, received the protections afforded by the United States Constitution. In re Parker, 423 F.2d 1021 (8th Cir. 1970). Moreover, a federal court's power when hearing constitutional questions is plenary, Townsend v. Sain, 372 U.S. 293, 312 (1963), and the federal court is not bound by a state court's adjudication of federal law. Brown v. Allen, supra, 344 U.S. at 506. See also, Wainwright v. Sykes, 433 U.S. 72, 87 (1977). On the other hand, absent constitutional deficiency, the habeas statute in 28 U.S.C. § 2254(d) instructs the federal court that state court factual findings are presumptively correct when supported by sufficient evidence and arrived at with procedural fairness. In re Parker, supra, 423 F.2d at 1024.

The Supreme Court has recently emphasized the limitations placed on federal

courts when asked to make a collateral evaluation of state court findings under the habeas statute. Sumner v. Mata, 449 U.S. 539, 544-549 (1981). The teaching of Sumner is that federal courts must explicitly state their reasons for differing from state court findings. Id. at 548. See e.g. Lombard v. Taylor, 606 F.2d 371 (2d Cir. 1979), cert. denied 445 U.S. 946 (1980). As developed below, this Court has reviewed the state trial proceedings and has determined that the state appellate court's finding that petitioner's trial judge made a determination as to the voluntariness of petitioner's statement not entitled to deference. 28 U.S.C. § 2254(8).

The question presented by petitioner's voluntariness claim requires a determination of the procedures the Constitution mandates for a hearing on the voluntariness of a defendant's inculpatory statement. The

importance of the voluntariness question cannot be overstated, because "[i]t is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." Jackson v. Denno, 378 U.S. 368, 376 (1964). The Supreme Court has stated: "A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." Id. at 381. In Jackson, the Supreme Court struck down a New York procedure which allowed the jury that was to determine a defendant's guilt simultaneously to determine the voluntariness of the defendant's confession. Emphasizing that the evaluation of an inculpatory statement is always a sensitive task,

the Supreme Court reasoned that placing the double determination of voluntariness and guilt in the same hands ran too great a risk of collapsing the double into a single determination. Id. at 389-390. The Constitution does not nominate any particular agent to decide the voluntariness question. Id. at 391 n.19. To comport with the due process clause of the Fourteenth Amendment, however, the "procedures must . . . be fully adequate to ensure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend."[2] Id. at 391.

---

[2] The South Dakota Supreme Court brought the state's criminal procedures into line with Jackson in State v. Thundershield, 83 S.D. 414, 160 N.W.2d 408 (1968). There the court held that proof of the voluntariness of a confession "must be made in an independent hearing of all the relevant facts outside the presence of the jury." Id. at 422, 160 N.W.2d at 412.

The record of petitioner's trial reveals that the evidence on the voluntariness of petitioner's statement to Sheriff Long and Agent Peterson was taken during the course of the trial, in open court, and before the jury (Trial Transcript 79-104).

The testimony by Sheriff Long regarding the voluntariness of this statement was elicited in the court of his testimony regarding the State's case in chief. Agent Peterson was then called to corroborate that part of the Sheriff's testimony involving the inculpatory statement. Petitioner's counsel did object to admission of the statement into evidence at the end of Sheriff Long's direct examination on the ground that the statement was involuntarily given. (TT 89).[3] The trial judge overruled the objection at that

---

[3] Besides the defense counsel's objection to the statement's admission into evidence, the trial court also had before it petitioner's

time, but her ruling came before cross-examination of the witness and before any testimony by Agent Peterson.

The hearing afforded petitioner does not measure up to the due process requirements enunciated in Jackson. The Supreme Court has called for a "clear-cut" determination of a statement's voluntariness. In petitioner's case, the trial court made no distinct finding as to the voluntariness of the statement. The South Dakota Supreme Court said of this procedure that "[t]he trial court, by allowing the statement into evidence, impliedly ruled that it was given voluntarily." State v. Lufkins, supra, 309 N.W.2d at 334. The

---

own handwritten objection to the voluntariness of the statement. The trial judge received this objection before the beginning of trial. Furthermore, petitioner himself challenged the veracity of Sheriff Long while the Sheriff was testifying (TT 85). There can be little doubt that petitioner raised the question of voluntariness or that the trial judge was aware of the issue. See Wainwright v. Sykes, supra, 433 U.S. at 91.

Constitution and the United States Supreme Court require more than the implicit rulings. The requirement is for a clear-cut determination which means that a criminal defendant has a right to expect that the agent deciding the issue of voluntariness will evaluate all the evidence concerning voluntariness before making an overt ruling on the voluntariness issue.

Even assuming that implicit rulings are adequate to meet due process standards, the timing of the judge's decision in petitioner's case undercuts any possibility that the judge's implicit ruling was arrived at reliably. The judge admitted petitioner's statement into evidence at the end of Sheriff Long's direct examination. The judge's ruling was made before petitioner's counsel had an opportunity to test the accuracy of the sheriff's account of how the statement was obtained. Fundamental to the adversary

process is the submission of each witness's assertions to that great legal engine for the discovery of proof, cross-examination.[4]

As stated above, a defendant who claims that his statement was not voluntarily given "is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." Jackson v. Denno, supra, 378 U.S. at 380. With the "determination" made before the cross-examination of a witness, before hearing all the evidence the state would present regarding voluntariness, and before petitioner could present evidence of his own, the actuality and reliability of the factual investigation are too suspect to satisfy the requirements of due process. The underlying factual issues had scarcely been

---

[4] See F. J. Wigmore, Evidence Section 1867 (Chadbourne Rev. 1974).

opened before the trial judge implicitly resolved them.

Respondents argue that the procedure employed by the trial judge in petitioner's case is saved by Pinto v. Pierce, 389 U.S. 31 (1967). There the Supreme Court upheld a conviction even though the trial judge held a voluntariness hearing in the presence of the jury. The judge who tried the petitioner in Pinto had repeatedly asked the petitioner's counsel if counsel had any objection to holding the hearing in the jury's presence. Defense counsel expressly waived any right to hold the hearing outside the jury's presence.

At petitioner's trial, the prudence of holding the hearing in the jury's presence was never considered. There was no waiver. Whether Pinto would protect a trial judge's decision to hold a voluntariness hearing in the jury's presence when the judge knew of

the defendant's objections to the voluntariness of this statement[5] would be a difficult question. That question is not, however, before this Court. The standard that applied in Pinto was "that a defendant's constitutional rights were violated when his challenged confession is introduced without a determination by the trial judge of its voluntariness after an adequate hearing." Pinto v. Pierce, supra, 389 U.S. at 32. Without an adequate hearing and without an explicit determination by the trial judge, petitioner's case is not governed by Pinto.

The procedures used by the state to determine the voluntariness of petitioner's statement were constitutionally defective. The federal habeas court cannot, however, decide whether petitioner's statement was in

---

5 See supra note 3.

fact voluntarily given. Principles of federalism constrain the federal habeas court to defer to the state so that it may "provide [petitioner] with that which he is constitutionally entitled -- an adequate evidentiary hearing productive of reliable results concerning the voluntariness of his confession." Jackson v. Denno, supra, 378 U.S. at 393-94. Petitioner's claim shall, therefore, be remanded to the state judicial system so that he may receive a hearing on the voluntariness of his statement as provded by state procedures.[6] See id. at 392-96.

---

[6] Remanding petitioner's case for an adequate voluntariness determination is not a sterile gesture that would merely save constitutional appearances. As noted infra, the inculpatory statement had real impact on petitioner's trial. Under the standard adopted by the South Dakota Supreme Court, the burden is placed upon the State to prove beyond a reasonable doubt that the statement was voluntarily made. State v. Stumes, 90 S.Ct. 382, 390 n.4, 241 N.W.2d 587, 591 n.4 (1976); State v. Kiehn 86 S.D. 549, 199 N.W.2d 594, 598 (1972); State v. Thundershield, 83 S.D. 414, 422, 160 N.W.2d 408, 412 (1968).

EFFECTIVE ASSISTANCE OF COUNSEL

The second claim presented by petitioner's habeas application is that he lacked effective assistance of counsel in violation of the Smith [sic] Amendment as made applicable to the states by the Fourteenth Amendment. Because counsel is presumed to be competent, a petitioner alleging ineffective assistance of counsel shoulders a heavy burden when challenging the effectiveness of his representation. Cox v. Wyrick, 642 F.2d 222, 225 (8th Cir.), cert. den., 451 U.S. 1021 (1981); Thomas v. Wyrick, 535 F.2d 407, 413 (8th Cir.), cert. den., 429 U.S. 868 (1976). Moreover, a federal court reviewing habeas corpus petitions is bound by the factual findings made by state courts unless one of the circumstances encompassed in 28 U.S.C. § 2254(d) applies. Sumner v. Mata, 449 U.S. 439 (1981).

The South Dakota Supreme Court ruled that petitioner was not denied effective assistance of counsel after "carefully review[ing] the particulars which [petitioner] contends indicate the ineffectiveness of his trial counsel." State v. Lufkins, supra, 309 N.W.2d at 337. The South Dakota Supreme Court appears to have based its finding on the transcripts of petitioner's trial and hearings. On its own review of that record, this Court concluded that the record was not adequately developed to support a determination of trial counsel's effectiveness. 28 U.S.C. § 2254(d). See aso Townsend v. Sain, supra, 372 U.S. at 313. An evidentiary hearing held before this Court compels the conclusion that the state court findings are not entitled to a presumption of correctness. 28 U.S.C. § 2254(d). See also Sumner v. Mata, supra, 449 U.S. at 552. Petitioner

has carried his burden "by convincing evidence that the factual determination by the state court was erroneous." 28 U.S.C. § 2254(d).

Petitioner's trial counsel is an experienced attorney who has been a member of the South Dakota bar for thirty-five years. He has represented a significant number of criminal defendants in that time (Habeas Corpus Evidentiary Transcript 46). A court reviewing a defense attorney's work should not sit merely to second-guess the attorney with the benefits of hindsight. Thomas v. Wyrick, supra, 535 F.2d at 413. Even with due regard to his experience, however, counsel's conduct of the defense must still meet the standard that an attorney should "exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976),

cert. den., 434 U.S. 844 (1977). Accord Cox v. Wyrick, supra, 642 F.2d at 226. Under the circumstances of this case, petitioner's counsel did not meet this standard.

At a minimum, to prove ineffectiveness of counsel, petitioner must show that counsel was derelict in some duty. Zaehringer v. Brewer, 635 F.2d 734, 737 (8th Cir. 1980). For a lawyer to fail to exercise his professional judgment on behalf of a client is a serious breach of his duty to that client.[7] Thomas v. Wyrick, supra, 535 F.2d at 413. In petitioner's case, defense counsel was faced

---

[7] The ABA Code of Professional Responsibility provides that a lawyer should represent his client zealously within the bounds of the law. Canon 7. Under a lawyer's duty to represent his client competently (Canon 6), the Code provides that a lawyer should not "[h]andle a legal matter without preparation adequate in the circumstances." D.R. 6-101(a)(2). See SDCL Section 16-18 Appx.

with defending a client who had given a statement to the authorities implicating himself in a homicide. At the time of the trial counsel knew[8] that his client maintained that the statement was neither

---

[8] At the evidentiary hearing before this Court, defense counsel asserted that he had never before seen the list of objections that petitioner wrote to his trial judge. He denied that petitioner had handed him the list to transmit to the judge or that he knew its contents (HCET 50, 55). Counsel's statements directly contradicted petitioner, who testified that he drew up the list of objections with the help of counsel and that he gave counsel the list to deliver to the judge (HCET 19, 72).

At the time of petitioner's trial, moreover, counsel not only was aware of the objections but also asserted that "I had the defendant write out a statement which the Court has just read. . . ." This statement, written in petitioner's "own handwriting asking that there be several things done in this case," is the list of objections filed with the trial court (Transcript of Proceedings, June 12, 1980) [Withdrawal of Plea]5). Prominently included in this list was petitioner's objection to the voluntariness of his inculpatory statement. This Court finds that counsel's earlier representation as to his participation in drawing up the list more credible.

voluntarily given nor representative of his version of the events of December 4, 1979. Counsel described his trial strategy as one based on the theory that his client did not strike the victim (HCET 57), and he admits the voluntariness of his client's statement to the authorities was material to the case (HCET 61).

The steps open to counsel were clearly defined at the time of defendant's trial:

> When a confession or incriminating statement allegedly made by the accused is offered by the prosecution and objected to, the state has the burden of proving beyond a reasonable doubt the same was freely and voluntarily made. This proof must be made in an independent hearing of all relevant facts outside the presence of the jury. At this hearing the defendant may testify and be cross-examined as to the issue of voluntariness without jeopardy or waiver of his right to remain silent at the trial.

State v. Thundershield, 83 S.D. 414, 422, 160 N.W.2d 408, 412 (1968). A reasonably competent attorney exercising minimal skill in the

representation of petitioner would have sought to test the voluntariness of his client's statement under the provisions of Thundershield. Counsel accurately testified that he objected to the voluntariness of the statement at trial, but that cursory objection did not satisfy his duty for competent representation. As counsel himself characterized the objection, it was a "catchall objection" (HCET 52). The procedures made available to criminal defendants by Thundershield implicate fundamental constitutional rights. Regardless of the propriety of holding the voluntariness hearing in the jury's presence, effective assistance of counsel would mean that the issue was at least raised. A perfunctory objection such as counsel's in this case does not meet basic standards of representation. The Court can only conclude that counsel did not make a specific objection on due process grounds

because counsel was unaware of the due process dimension of holding the voluntariness hearing in the jury's presence.

An attorney has a duty to "exert his best efforts to ensure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so." ABA Code of Professional Responsibility E.C. 7-8. Petitioner himself initiated the decision-making process but received little assistance from his counsel. Counsel did not inform petitioner that he had the opportunity to challenge the voluntariness of his statement in a separate hearing or that he could testify at such a hearing without jeopardizing his right to remain silent at trial.[9]

---

[9] Counsel testified that he could not recall whether he informed petitioner of his right to testify at a suppression hearing but that

Counsel's failure seriously undercut his client's effort to defend himself.

An attorney does not fail "to render effective legal service if he fails to discuss with his client a procedural alternative which a reasonable attorney would consider having little or no likelihood of success." Zaehringer v. Brewer, supra, 635 F.2d at 737. See also Benson v. United States, 552 F.2d 223, 225 (8th Cir.), cert. den. 434 U.S. 851 (1977). Counsel in this case seems to have formed the opinion his client's statement was voluntarily given (HCET 52.)[10] Indeed, at trial counsel bolstered Agent Peterson's

---

he ordinarily touched on that matter (HCET 54). Petitioner testified that his attorney never informed him of his options (id. at 12). Counsel did not take notes of his conversations with petitioner (id. at 54), and this Court finds that petitioner's recollection is more likely correct.

[10] At the evidentiary hearing, this Court made a provisional ruling sustaining an

statement as to voluntariness (TT 102). The instances in which the Eighth Circuit upheld an attorney's decision not to prosecute available procedures were instances where such prosecution was obviously doomed to failure. Petitioner's voluntariness claim was not obviously condemned.

At the evidentiary hearing before this Court, the evidence raised a real question as to the voluntariness and accuracy of the statement. Certainly, a resolution of the voluntariness of the statement is beyond the province of this Court hearing a habeas petition, and the Court makes no attempt to resolve that question now. In light of the

---

objection to a question that solicited counsel's opinion as to the voluntariness of the statement. That ruling is now revoked, and counsel's answer that he believed the statement to be voluntary is part of the record.

heavy burden of proof placed on the state,[11] however, the testimony does demonstrate that petitioner's challenge is not so utterly frivolous as to presage sure failure if pursued. A reasonable attorney would not consider it as having little or no likelihood of success, and petitioner's counsel's failure to pursue it cannot be saved by calling it strategy. See Collins v. Auger, 577 F.2d 1108 (8th Cir. 1978).

Petitioner's demonstration that he was ineffectively represented by counsel is not enough to carry his burden. Petitioner must also show that his counsel's shortcomings prejudiced his defense. Thomas v. Wyrick, supra, 535 F.2d at 414. See also Wainwright v. Sykes, 433 U.S. 72 (1977). To show prejudice, petitioner does not have to prove that effective representation would have led

---

11 See supra, note 6.

to his acquittal. Thomas v. Wyrick, supra, 535 F.2d at 414. The precise standard of review is unsettled. Collins v. Auger, supra, 577 F.2d at 1110. The most demanding standard requires the reviewing court to evaluate the entire record to determine whether the other evidence presented at trial would negate any possible prejudice from admission of the inculpating statement. Id. at 1110-11 (citing Wainwright v. Sykes, supra). Petitioner has met this standard.

The evidence produced by the State against petitioner consisted primarily of testimony by three companions who supposedly witnessed the lethal events of December 4, 1979. None of these witnesses were particularly reliable. All had been drinking heavily from at least the early hours of December 4, and all had leaden memories of

the evening.[12] Petitioner's inculpatory statement in these circumstances surely took on particular significance. The trial did not produce a record in which "[t]he evidence of guilt presented at trial . . . was substantial to a degree that would negate any possibility of actual prejudice resulting . . . from the admission of [the] inculpatory statement." Wainwright v. Sykes, supra, 433 U.S. at 91. Counsel's failure to mount any challenge to the voluntariness of petitioner's inculpatory statement was, therefore, significantly prejudicial to petitioner's right to a fair trial.

---

[12] Petitioner's counsel did not move to have the witnesses sequestered as is permitted by SDCL § 19-14-29. Counsel knew that the recollection of the witnesses against his client was unsure (Transcript of Preliminary Hearing 38). Failure to move that these witnesses not have the chance to listen to one another's testimony, is another instance of counsel's failure to exercise his professional judgment in his client's behalf. See supra note 7 and accompanying text.

CONCLUSION

The evidence compels the conclusion that a writ of habeas corpus is appropriate. The findings regarding effective assistance of counsel take petitioner's relief beyond that stated in the first part of this opinion. Besides a suppression hearing, petitioner is entitled to a new trial or release from prison. The State of South Dakota will therefore be given a reasonable opportunity to re-try petitioner. If the State fails to take advantage of this opportunity, the writ of habeas corpus will issue. This memorandum constitutes the Court's findings of fact and conclusions of law.

FILED
January 10, 1983
William F. Clayton, Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

DENNIS LUFKINS,

Petitioner

v. CIV. 81-3060

HERMAN SOLEM, WARDEN; MARK V. MEIERHENRY, Attorney General, State of South Dakota,

ORDER

Respondents.

Petitioner having applied for a writ of habeas corpus, and on the basis of all the files and records of the above-entitled action, and for the reasons stated in the memorandum opinion filed this day, it is now hereby

ORDERED that the Clerk of this Court shall issue a Writ of Habeas Corpus as prayed

for by petitioner, provided however that this Order shall be stayed for a period of ninety days.

Dated January 10, 1983.

BY THE COURT:

DONALD J. PORTER
UNITED STATES DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: Judy L. Harvey
Deputy

(SEAL OF COURT)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

83-1078

Dennis Lufkins, Appellee,	)	
v.	)	Appeal from the United States District Court for the District of South Dakota
Herman Solem, Warden; Mark Meierhenry, Attorney General of South Dakota, Appellants.	)	

Submitted: June 17, 1983
Filed: September 12, 1983

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, and ROSENN,* Senior Circuit Judges.

---

*The Honorable Max Rosenn, Senior Circuit Judge for the United States Court of Appeals for the Third Circuit, sitting by designation.

FLOYD R. GIBSON, Senior Circuit Judge.

Dennis Lufkins, a life-term prisoner convicted of voluntary manslaughter in a South Dakota state trial court, sought a writ of habeas corpus in the federal district court,[1] alleging: (1) he was denied due process because inadequate procedures were used by the trial court to determine the voluntariness of an incriminating statement he gave to law enforcement authorities; and (2) he was denied effective assistance of counsel. After an evidentiary hearing, the district court issued an order granting Lufkins habeas relief. The court ruled that under Jackson v. Denno, 378 U.S. 368 (1964), Lufkins was entitled to a new, full and fair hearing on the voluntariness of the incriminating statement. The court also ruled that Lufkins was entitled to a new trial or release

---

[1] The Honorable Donald J. Porter, United States District Judge, District of South Dakota.

from prison because he was denied effective assistance of counsel. South Dakota now appeals these rulings. We affirm.

I.

During a wine drinking party on December 4, 1979, at the residence of Ernest Hayes in Sisseton, South Dakota, Sylvester Johnson was clubbed in the head with an axe handle. Johnson apparently died while Ernest Hayes was driving him to the hospital. Hayes aborted his drive to the hospital, leaving the then deceased Johnson on a church lawn. The decedent's body was discovered on December 5, 1979. An autopsy determined that death was caused by a subdural hematoma, consistent with trauma inflicted by a blunt instrument.

On January 31, 1980, Lufkins signed an inculpatory statement provided by Sisseton County Sheriff Long and Division of Criminal

Investigation Agent Peterson. The signed statement indicated that Lufkins had hit Johnson during the wine drinking party of December 4, 1979. At the time he signed the statement, Lufkins was serving a sixty-day DWI sentence.

On April 21, 1980, Lufkins was arraigned on both first-degree manslaughter and habitual criminal informations. Lufkins pled not guilty to both charges. Prior to his trial, and in open court Lufkins personally filed with the trial court a handwritten list of objections to the proceedings against him. In this list, Lufkins stated that he had not hit the decedent, that the officers told him that "things would go easy for him" if he signed the incriminating statement, that the officers were "hollering at him," and that his state of mind was not clear when he signed the statement. Despite learning about

this list of objections, Lufkins' counsel made no pretrial motion to suppress the incriminating statement as allegedly involuntarily given.

During Lufkins' two-day trial, which began on June 30, 1980, Ernest Hayes, Eugene Hedine and Matthew Blue Dog testified that they spent most of the day on December 4, 1979, drinking wine and rubbing alcohol with Lufkins, Ruth Titus, and the victim Johnson. All three testified that Lufkins struck the victim with an axe handle. However, Lufkins's sister testified that Lufkins had been at her home from December 4 to December 5, 1979.

The trial court also admitted Lufkins' incriminating statement into evidence. The State's evidence on the voluntariness of this statement, which included the testimony of Sheriff Long and Agent Peterson, was taken

during the course of the trial, in open court, and in the jury's presence. Lufkins' trial counsel failed to request an independent voluntariness hearing outside of the jury's presence. Sheriff Long's testimony that the statement was voluntarily given was elicited during the State's case in chief. While Sheriff Long was testifying, Lufkins rose to his feet and challenged the Sheriff's veracity. The trial court also had before it Lufkins's pretrial handwritten objections to the voluntariness of the statement. After Sheriff Long finished testifying on direct examination, Lufkins' counsel objected to the admission of the statement into evidence on the ground that it was involuntarily given. The trial judge overruled the objection and admitted the statement into evidence. This ruling came before any cross-examination of the sheriff, before any corroborating testimony by Agent Peterson, and before Lufkins

was given an opportunity to present any rebuttal evidence. Lufkins was convicted of first degree manslaughter; he also pled guilty to the habitual offender charge and was sentenced to life imprisonment.

On direct appeal, a divided South Dakota Supreme Court rejected all of Lufkins' claims and affirmed his conviction. State v. Lufkins, 309 N.W.2d 331 (S.D. 1981) (Morgan and Foshiem, J.J. dissenting). Included among these rejected claims were Lufkins' claim that he was denied due process by the admission of his incriminating statement without a prior determination of its voluntariness outside of the jury's presence and his claim that he was denied effective assistance of counsel. Id. at 333-34, 336-37.

In rejecting Lufkins' voluntariness claim, the South Dakota Supreme Court was apparently under the mistaken impression that

the trial court admitted the statement after Sheriff Long had been cross-examined. The supreme court stated:

> After Sheriff Long was extensively questioned in the presence of the jury by both the State and appellant regarding the voluntary nature of the statement, the trial court admitted the statement into evidence over appellant's objection.

309 N.W.2d at 333. The supreme court went on to find that "the trial court, by allowing the statement into evidence, impliedly ruled that it was given voluntarily." Id. at 334. The Court, citing Pinto v. Pierce, 389 U.S. 31 (1967), also found that: "[b]y not making the appropriate objection, appellant's trial counsel consented to the taking of evidence in the jury's presence on the voluntariness of the statement." The court then concluded that "[Lufkins] was not denied his constitutional rights by the admission of the statement into evidence." Id. at 335.

Lufkins thereafter filed his writ of habeas corpus in the federal district court, raising the same voluntariness and ineffective assistance of counsel claims that had been rejected by the South Dakota Supreme Court. The district court received briefs from both sides and granted Lufkins' motion for expansion of the record pursuant to 28 U.S.C. § 2254, Rule 7, to include transcripts of all state court proceedings. The district court then determined that Lufkins' ineffective assistance claim could not be resolved on the basis of the expanded record alone and therefore granted an evidentiary hearing pursuant to 28 U.S.C. § 2254(d). At the evidentiary hearing, Lufkins' trial counsel was called as a witness by the State and cross-examined at length by Lufkins' habeas counsel.

The district court issued a memorandum opinion granting Lufkins' writ of habeas corpus. First, the district court, relying on Jackson v. Denno, 378 U.S. 368, 380 (1964), concluded that Lufkins was denied a full and fair hearing. The district court specifically found: (1) the trial court made no distinct finding of the voluntariness of the statement; and (2) the statement was admitted before cross-examination of Sheriff Long and before Lufkins could present evidence of his own. The district court also noted that while Pinto v. Pierce, 389 U.S. 31 (1967), held that a defendant could expressly waive his right to a voluntariness hearing outside the jury's presence, there was no such waiver here; and, regardless of the propriety of the jury's presence, Lufkins was still denied an adequate and reliable voluntariness hearing. The district court therefore remanded to the state judicial

system so that Lufkins could receive a full and fair voluntariness hearing.

Second, the district court concluded that Lufkins was denied effective assistance of counsel, entitling him to a new trial. The district court found that a reasonably competent attorney exercising minimal skill in the representation of his client would have sought to test the voluntariness of Lufkins' statement by requesting an independent voluntariness hearing outside of the jury's presence, a procedure made available to criminal defendants in State v. Thundershield, 160 N.W.2d 408, 412 (S.D. 1968). The district court further emphasized that competent counsel at the very least would have raised a due process objection to holding the hearing in the jury's presence. The court characterized counsel's objection to the voluntariness of the statement as a "cursory"

and "catchall objection," falling far short of the duty of competent representation. The court also noted that counsel's ineffectiveness was evidenced by his bolstering of the State's witnesses and his failure to sequester the three purported eyewitnesses whose testimony was not particularly reliable.

The district court concluded that counsel's ineffectiveness significantly prejudiced Lufkins' right to a fair trial. In doing so, the court emphasized the weakness of the government's case apart from Lufkins' incriminating statement. Specifically, the three purported eyewitnesses who testified that Lufkins hit the victim were viewed as unreliable because they all had been drinking heavily prior to the lethal events of December 4.

II.

The State first argues that the issue of whether Lufkins was denied due process because of the lack of a full and fair voluntariness hearing was not exhausted in the South Dakota Supreme Court. It contends that the only issue before the South Dakota Supreme Court was whether the trial court erred in holding the voluntariness hearing in the jury's presence.

The issue of whether Lufkins was denied due process because of the lack of a full and fair voluntariness hearing was squarely before the South Dakota Supreme Court. Lufkins' claim before both the state supreme court and the federal district court was that he was deprived due process by the defective procedures the trial court used to determine the voluntariness of his statement. In order to comply with the due process clause, the trial court was required to provide Lufkins

with a fair voluntariness hearing, one that was "fully adequate to insure a reliable and clear-cut determination of the confession including the resolution of disputed facts upon which the voluntariness issue may depend." Jackson v. Denno, 378 U.S. 368, 380, 391 (1967). Thus, by concluding that the trial court procedures for determining voluntariness did not violate Lufkins' due process right, the supreme court necessarily considered those procedures to have been full and fair.

Moreover, the specific findings made by the South Dakota Supreme Court indicate that it considered the fullness and fairness of the voluntariness hearing. First, the supreme court specifically found that the trial court's admission of Lufkins' statement into evidence constituted an independent determination of voluntariness. Under Jackson v. Denno, a necessary component of a

fair and fully adequate voluntariness hearing is a distinct determination of voluntariness. 378 U.S. at 380. Indeed, the district court's conclusion that the state trial court procedures were not full and fair was based in large part upon its rejection of the supreme court's finding that the trial court made a distinct determination of voluntariness. The supreme court also found, albeit erroneously, that Lufkins' statement was admitted only after Sheriff Long had been subject to extensive cross-examination by Lufkins' counsel. This erroneous finding certainly would have fostered a belief on the part of the supreme court that the hearing was fair and fully adequate to insure a reliable determination of voluntariness.

The State however urges that the South Dakota Supreme Court's opinion only addressed Lufkins' claim that the trial court erred in holding the hearing in the jury's presence.

While it is true that the supreme court's opinion primarily focused upon the propriety of the trial court's holding the hearing in the jury's presence, we cannot infer from this that the supreme court failed to consider other aspects of the fairness and adequacy of the trial court's procedures. Indeed, in order to conclude that the trial court procedures complied with due process, the court must have reviewed the overall fairness and adequacy of the hearing, in addition to the propriety of the jury's presence. Therefore, we conclude that Lufkins' claim as to the unfairness and inadequacy of the voluntariness hearing, having been fairly presented to and passed upon by the South Dakota Supreme Court, is exhausted. Picard v. Connor, 404 U.S. 270, 275 (1971).

III.

We now consider the fairness and adequacy of the procedures used by the trial court to determine the voluntariness of Lufkins' incriminating statement. The State argues that the trial court's procedures were fair and fully adequate to insure a reliable and clear-cut determination of voluntariness. It alternatively suggests that any procedural errors were harmless because the testimony of Officers Long and Peterson clearly established that the statement was voluntarily given.

In Jackson v. Denno, the Supreme Court struck down a state procedure allowing the same jury to determine both the defendant's guilt and the voluntariness of the defendant's confession for admissibility purposes. The Court reasoned that placing the determination of voluntariness for admissibility purposes and guilt in the same hands posed a

significant risk that matters pertaining to the defendant's guilt and the truthfulness or reliability of his confession would infect the findings bearing upon voluntariness. 378 U.S. at 383, 386-87, 389-90, 394. The Jackson court stated: "[I]t is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." Id. at 376. The Court accordingly held that in order to assure compliance with the due process clause of the fourteenth amendment, the trial court procedure for determining voluntariness "must . . . be fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." Id. at 391.

We argee with the district court that the procedures employed by the trial judge fell short of satisfying the due process standard enunciated in Jackson v. Denno. First, we express grave doubts as to whether the trial court's admission of the statement into evidence met the Jackson v. Denno requirement of a "clear-cut determination" of the voluntariness of the statement. See Sims v. Georgia, 385 U.S. 538, 544 (1967) (trial court's finding of voluntariness "must appear from the record with unmistakable clarity."); See also Parker v. Sigler, 413 F.2d 459, 462 (8th Cir. 1969) (trial court's overruling of objection to admission of confession insufficient to constitute a finding of voluntariness), rev'd on other grounds, 396 U.S. 482, 483 (1970).

However, even assuming the admission of the statement did constitute a "clear-cut determination" of voluntariness, the timing

of the trial court's admission of the statement rendered a fair and reliable determination of voluntariness highly improbable if not impossible. The trial court admitted the statement after Sheriff Long testified that the statement was voluntarily given, but before Lufkins had an opportunity to test the accuracy and reliability of Sheriff Long's testimony by cross-examination or by rebuttal evidence. That Lufkins vehemently disputed Sheriff Long's account was evidenced by Lufkins' pretrial list of objections and his challenges to the veracity of Sheriff Long's testimony while the Sheriff was testifying. Yet despite this factual dispute surrounding the circumstances under which Lufkins' incriminating statement was given, the trial judge admitted the statement before giving Lufkins an opportunity to challenge Sheriff Long's version. A voluntariness hearing that

prevents a defendant from challenging the State's evidence as to voluntariness of his statement can be neither fair nor reliable. See, United States ex rel. Hickman v. Sielaff, 521 F.2d 378, 386 (7th Cir. 1975) (voluntariness hearing incomplete where trial judge fails to hear defendant's version).

In United States v. Carignan, 342 U.S. 36, 38 (1951), the Supreme Court held that the trial court committed reversible error by admitting defendant's confession into evidence after the State had presented evidence of voluntariness but without giving the defendant an opportunity to present rebuttal evidence. The Court in Carignan reasoned that the "[defendant's] evidence would be pertinent to the inquiry on admissibility and might be material and determinative." Id. We believe this reasoning is directly applicable here.

We also question the propriety of the trial court's holding the voluntariness hearing in the jury's presence. In Pinto v. Pierce, 389 U.S. 31 (1967), the Supreme Court upheld a conviction even though the trial judge held a voluntariness hearing in the presence of the jury. In doing so, the Supreme Court emphasized that the trial judge had repeatedly asked defense counsel whether there was any objection to holding the hearing in the jury's presence and counsel expressly waived any objection. Id. at 32-33. The Pinto court held that "[s]ince trial counsel consented to the evidence on voluntariness being taken in the presence of the jury, and the judge found the statement voluntary, [defendant] was deprived of no constitutional right." Id. at 33.

The reasoning underlying the Pinto holding seems clear enough: if defense

counsel waives objection to the jury's presence, then no claim can be made that the voluntariness hearing was unfair or inadequate because the jury was present. Id. at 32. By the same token, however, we believe Pinto at least implicitly recognizes that if there is no waiver, it may be unfair to hold the hearing in the jury's presence.[2] The Court in Pinto, 389 U.S. at 32 n.2, specifically noted its earlier holding in United States v. Carignan, 342 U.S. at 38, that a

---

[2] Circuit courts have interpreted Pinto differently. Some courts read Pinto to require a waiver of objection to the jury's presence. See United States ex rel. Hickman v. Sielaff, 521 F.2d 378, 379-80 (7th Cir. 1975); Lindsey v. Craven, 521 F.2d 1071, 1072-73 (9th Cir. 1975); Gladden v. Unsworth, 396 F.2d 373, 375 n.1 (9th Cir. 1968); cf. United States ex rel. Bennett v. Rundle, 419 F.2d 599, 605 (3d Cir. 1969) (under Jackson v. Denno jury is necessarily to be excluded from voluntariness hearing.) One court seems to interpret Pinto as saying that regardless of waiver, the jury's presence does not violate due process when the confession is proven voluntary. See Martinez v. Estelle, 612 F.2d 173, 177 (5th Cir. 1980).

defendant who challenges the voluntariness of a confession should be given an opportunity to testify as to the facts surrounding his confession in the absence of the jury.3

In the instant case, the trial court never considered the propriety of holding the hearing in the jury's presence, despite knowing of Lufkins' vehement objections to the voluntariness of the statement. Unlike Pinto, the trial court here never asked defense counsel if he had any objection to the jury's presence and there was no express waiver. Whether Pinto permits a trial court to hold a voluntariness hearing in the jury's

---

3 In Watkins v. Sowders, 449 U.S. 341, 346 (1980), the Supreme Court assumed, without expressly deciding, that Jackson v. Denno established a per se due process right to a hearing outside the presence of the jury whenever a question of voluntariness of a confession is raised.

presence when the judge knows of the defendant's vehement objections to the voluntariness of the statement is a very difficult question. Under the circumstances presented here, it certainly would have been prudent for the trial court to have asked whether Lufkins' counsel consented to the jury's presence. Pinto, 389 U.S. at 32. However, even assuming trial counsel's failure to object to the jury's presence constitutes a waiver under Pinto, the trial court's procedures were still constitutionally defective because, as set forth above, they were incapable of insuring a fair and reliable determination of voluntariness. It should be noted that in Pinto the determination of voluntariness was not made until after all evidence concerning that subject was heard which included the testimony of the defendant.

We cannot agree with the State that Lufkins' opportunity to cross-examine Sheriff Long and to present rebuttal evidence after the trial court had admitted the incriminating statement satisfies the requirement of a fair and reliable determination of voluntariness. Once the trial court admitted the statement and thereby impliedly determined that it was voluntarily given, and subsequent effort to challenge the admissibility of the statement and to have it excluded from the jury's consideration would have been virtually futile. See Hickman, 521 F.2d at 386. Moreover, even if subsequent cross-examination and rebuttal evidence conceivably could have enabled the trial court to later make a reliable determination of voluntariness, there was no such determination here. The only gesture by the trial court even remotely resembling a determination of voluntariness

was the ruling admitting the statement into evidence, which came before Lufkins was given an opportunity to cross-examine the State's witnesses and to present his own rebuttal evidence.

Alternatively, the State contends that any procedural error here was harmless because the purported "airtight" testimony of Sheriff Long and Investigator Peterson clearly established the Lufkins' statement was voluntarily given. We disagree. The officer's testimony, no matter how seemingly airtight, could not have supported a reliable determination of voluntariness until that testimony was first tested by Lufkins' cross-examination and rebuttal evidence. Providing a defendant with a meaningful opportunity to challenge the state's testimony on voluntariness is not an extravagant, procedural formality to be cast aside when convenient;

it is fundamental to a fair and reliable determination of voluntariness and hence firmly rooted in the due process clause of the fourteenth amendment.

IV.

The State contends the district court erred in finding that Lufkins' trial counsel was incompetent. First, the State urges that under 28 U.S.C. § 2254(d) the district court was bound by the South Dakota Supreme Court's finding of counsel's competence. Furthermore, the State suggests, counsel's failure to request an independent voluntariness hearing outside of the jury's presence was a reasonable tactical choice because Lufkins' voluntariness claim was destined to fail. Finally, the State contends that Lufkins could not have been materially prejudiced by counsel's purported incompetence because of other evidence existing in the record to sustain guilt.

To prevail on his claim of ineffective assistance of counsel, a habeas petitioner must demonstrate: (1) that his attorney failed to exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances; and (2) that he suffered material prejudice as a result. Morrow v. Parratt, 574 F.2d 411, 412-413 (8th Cir. 1978). A federal court reviewing a habeas petitioner's ineffective assistance claim must accord a presumption of correctness to a state court's determination of effectiveness unless one of the circumstances set forth in 28 U.S.C. § 2254(d) applies. Sumner v. Mata, 449 U.S. 539, 551-52 (1981).

Considering the foregoing, we initially note that the district court acted properly in holding an evidentiary hearing on Lufkins' ineffective assistance claim because the record before the South Dakota Supreme Court

was not adequately developed to support a determination of counsel's effectiveness. Townsend v. Sain, 372 U.S. 293, 313 (1963). Moreover, having carefully reviewed the district court's evidentiary hearing transcript, which includes the testimony of Lufkins and his trial counsel, and the State court record, which includes the transcript of Lufkins' trial, we hold that the district court properly concluded that Lufkins carried his burden of proving by convincing evidence that the South Dakota Supreme Court's finding of trial counsel's competence was erroneous. 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. at 550 (1981).

Lufkins' trial counsel, despite having experience in representing criminal defendants, failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under the circumstances. Specifically, Lufkins' trial

counsel failed to fulfill his duty to exercise his professional judgment on behalf of his client and his duty of adequate legal preparation. Thomas v. Wyrick, 535 F.2d 407, 413 n.6 (8th Cir. 1976). See also ABA Code of Professional Responsibility, D.R. 6-101 (A)(2). Lufkins' trial counsel knew that Lufkins had given a statement directly implicating himself in a homicide. He also recognized that his client vehemently maintained that the statement was given involuntarily.[4] Counsel's trial strategy was based on the theory that someone other than Lufkins had struck the decedent, a theory

---

[4] Although at the evidentiary hearing before the district court, defense counsel denied having ever actually seen the contents of Lufkins' handwritten list of objections filed in open court on June 12, 1980, he was certainly aware of the document's existence. Moreover, Lufkins testified that he had counsel's help in drawing up the list and that counsel delivered the list to the judge.

that was to be undercut directly by the admission of the incriminating statement signed by Lufkins. Counsel therefore readily admitted during the evidentiary hearing before the district court that the voluntariness of his client's statement was a material issue in the case.

Under these circumstances, trial counsel had a duty to test the voluntariness of Lufkins' statement. Under the provisions set forth in State v. Thundershield, 160 N.W.2d at 412, counsel could have challenged the voluntariness of the statement in an independent hearing outside of the jury's presence. Thundershield, 160 N.W.2d at 412, provides:

> When a confession or an incriminating statement allegedly made by the accused is offered by the prosecution and objected to, the State has the burden of proving beyond a reasonable doubt the same was freely and voluntarily made. This proof must be made in an independent hearing of all relevant

> facts outside the presence of the jury. At this hearing the defendant may testify and be cross-examined as to the issue of voluntariness without jeopardy to or waiver of his right to remain silent at the trial.

The procedures made available to a criminal defendant in Thundershield implicate fundamental constitutional rights. In Pinto v. Pierce, 389 U.S. at 32-33, the Supreme Court implicitly recognized that a defendant is entitled to an independent hearing outside of the presence of a jury unless he waives that right. Also, in United States v. Carignan, 342 U.S. at 38, the Supreme Court recognized that a defendant who challenges the voluntariness of a confession should be given an opportunity to testify as to the facts surrounding his confession in the absence of the jury.

We therefore conclude that reasonably competent counsel would have attempted to test the voluntariness of Lufkins' statement

under the provisions of Thundershield. At the very least, competent counsel would have made an objection on due process grounds to having the hearing in the jury's presence. Furthermore, competent counsel would have raised an objection to the trial court's admission of the statement without first giving counsel an opportunity to cross-examine and to rebut the State's witnesses. Here, Lufkins' counsel failed: to request an independent voluntariness hearing; to inform Lufkins that he had an opportunity to challenge the voluntariness of his statement in a separate hearing during which he could testify without jeopardizing his right to remain silent; to make any objection to holding the hearing in the jury's presence; and to object to the trial court's admission of the statement without the benefit of cross-examination of the State's witnesses.

Counsel also bolstered Agent Peterson's testimony as to the voluntariness of Lufkins' statement. Counsel's failures here seriously undercut Lufkins' effort to defend himself. Although counsel did make a cursory, catchall objection to the admission of the incriminating statement, this did not satisfy his duty of competent representation.

The State however urges that Lufkins' trial counsel reasonably believed that Lufkins' statement was voluntarily given and that a voluntariness challenge would have been futile. While a reasonably competent attorney is not required to pursue a procedural alternative having little or no likelihood of success, Zaehringer v. Brewer, 635 F.2d 734, 737 (8th Cir. 1980), Lufkins' voluntariness challenge could not have been fairly regarded as having little or no likelihood of success. At the evidentiary hearing before the district court, Lufkins

raised a genuine question as to the voluntariness and accuracy of his incriminating statement. Specifically, questions were raised about Lufkins' state of mind when he signed the statement. Without attempting to resolve the voluntariness question now, we conclude that, considering the heavy burden placed on the State to prove beyond a reasonable doubt that the statement was voluntarily made,[5] a reasonably competent attorney would not have considered a voluntariness challenge as futile.

Lufkins has also met his burden of proving that counsel's ineffectiveness prejudiced his defense. The trial record does not show that "[the] other evidence of guilt presented at trial . . . was substantial to a degree that would negate any possibility of actual prejudice resulting from the admission

---

[5] See Thundershield, 160 N.W.2d at 412.

of [the] inculpatory statement." Wainwright v. Sykes, 433 U.S. 72, 91 (1977). Other than the incriminating statement, the only evidence of guilt was the testimony of three companions who purportedly witnessed Lufkins hit the decedent with an axe handle on the evening of December 4, 1979. However, as emphasized by the district court, these witnesses were not particularly reliable because they had been drinking heavily from the early hours of December 4, and they had difficulty recalling the events of that evening. Furthermore, apart from the prejudice caused by counsel's failure to challenge the admission of the incriminating statement, counsel undercut Lufkins' trial defense by failing to sequester these eyewitnesses so that they could not listen to one another's testimony. We believe this was further evidence of counsel's prejudicial

failure to exercise his professional judgment in his client's behalf.

V.

The last and certainly most difficult issue we address is whether the district court erred in ruling that trial counsel's ineffectiveness entitled Lufkins to a new trial. The State argues that if a new voluntariness hearing determines that Lufkins' statement was voluntary and therefore properly before the jury, counsel's ineffectiveness in failing to mount a voluntariness challenge would be nonprejudicial, and would not warrant a new trial. In support of this argument, the State relies upon Jackson v. Denno, 378 U.S. at 394, where the Court states:

> If at the conclusion of such an evidentiary hearing in the State Court on the coercion issue, it is determined that [the defendant's] confession was voluntarily given, admissible in evidence, properly to

> be considered by the jury, we see no constitutional necessity at that point for proceeding with a new trial, for [the defendant] has already been tried by a jury with a confession placed before it and has been found guilty.

Although superficially appealing, the State's argument is defective in two significant respects. First, while the district court primarily focused upon counsel's ineffectiveness in failing to mount a voluntariness challenge, it also found that counsel's ineffectiveness was reflected by his failure to sequester the three purported eyewitnesses who were to testify, and by his apparent bolstering of a State's witness. Certainly the prejudice resulting from counsel's failure to sequester the three unreliable eyewitnesses and his bolstering of a State witness would not be cured by a subsequent determination of voluntariness in a full and fair voluntariness hearing.

Second, the remedy in Jackson v. Denno was not intended to cover situations where counsel prejudices his client's right to a fair trial by failing to request an independent voluntariness hearing outside of the jury's presence. In his concurrence in Pinto, 389 U.S. at 33-34, Justice Fortas accentuated the danger of having the jury present while the trial judge hears evidence on the voluntariness of a confession and determines its admissibility. Justice Fortas stated:

> Jackson v. Denno means that the judge and the jury must each make an independent judgment of voluntariness of an admission, the judge for purposes of admissibility and the jury for evidentiary acceptability, credibility, and weight. A telescoped hearing before judge and jury, in which the judge finds voluntariness for purposes of admissibility, in reality reduces the jury function to an echo. Hearing the evidence simultaneously with the judge, the jury is not apt to approach disagreement with him. . . . [This procedure], by

> reducing the effectiveness of the jury, gravely impairs the constitutional principle of excluding involuntary confessions which Jackson v. Denno ought to serve.
>
> The jury is the traditional and preferred arbiter of facts. The procedure countenanced here, by dicta, sanctions, in effect, a direction to the jury to accept and give full credence to the admission --because the judge, hearing the same testimony, has ruled that the admission is voluntary.

Id. at 34. Accord Hickman, 521 F.2d at 386.

Applying Justice Fortas' insights to this case, even if a full and fair voluntariness hearing determines that Lufkins' statement was properly admitted during Lufkins's trial, this would not cure the prejudice caused by the jury's presence when the trial court took testimony on the voluntariness of Lufkins' statement and ruled that the statement was voluntary for purposes of admissibility. By failing to have the jury excluded, Lufkins' counsel significantly vitiated the jury's ability to make its own

independent judgment as to the voluntariness of the statement for purposes of "evidentiary acceptability, credibility, and weight."

We therefore affirm the district court's ruling the trial counsel's ineffectiveness so prejudiced Lufkins' right to a fair trial as to entitle Lufkins to a new trial.

A true copy.

ATTEST:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 83-1078-SD

September Term, 1982

Dennis Lufkins,

Appellee,

vs.

Herman Solem, Warden, et al,

Appellants.

FILED
September 12, 1983

Robert D. St. Vrain,
Clerk

Appeal from the United States District Court for the District of South Dakota.

This appeal from the United States District Court was submitted on the record of the said District Court, brief of the parties, and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

September 12, 1983

A true copy.

ATTEST:

CLERK, UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

11/2/83

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

DENNIS LUFKINS, Appellee, v. HERMAN SOLEM, Warden; MARK MEIERHENRY, Attorney General of South Dakota, Appellants.	)	No. 83-1078 PETITION FOR REHEARING

COMES NOW Appellants and pursuant to Rule 40 of the Federal Rules of Appellate Procedure and Local Rule 16 of the Rules of the United States Court of Appeals for the Eighth Circuit and respectfully petition this Court for a rehearing based on the grounds that the original panel's decision in this case erred in a critical Fact of this case. Such error is set forth in the State's accompanying Memorandum and Affidavits which are

attached hereto and incorporated in this Petition.

Dated this _____ day of September, 1983.

MARK V. MEIERHENRY
ATTORNEY GENERAL

Mikal Hanson
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-3215

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS.
COUNTY OF ROBERTS) FIFTH JUDICIAL CIRCUIT

State of South Dakota,
Plaintiff,

v. AFFIDAVIT

Dennis Lufkins,
Defendant.

* *

STATE OF SOUTH DAKOTA)
:SS.
COUNTY OF ROBERTS)

Vivian Hove, being first duly sworn, deposes and says:

I.

That she is the Clerk of Courts for Roberts County, South Dakota and held that position during the trial of State v. Dennis Lufkins which commenced on June 30, 1980.

II.

That she was present in the courtroom during the tesimony of Eugene Hadine, Ernest

Hayes and Matthew Bluedog. That to the best of your affiant's knowledge and belief, Eugene Hadine, Ernest Hayes and Matthew Bluedog were in the courtroom only to testify and that they were not present in the courtroom to hear the other two witnesses testify.

Dated at Sisseton, South Dakota, this _____ day of September, 1983.

_____
Vivian Hove

Subscribed and sworn to before me this ____ day of September, 1983.

_____
David Gilbertson - Notary Public
Roberts County, South Dakota

My commission expires June 6, 1991.

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS.
COUNTY OF ROBERTS) FIFTH JUDICIAL CIRCUIT

State of South Dakota,
Plaintiff,

v. AFFIDAVIT

Dennis Lufkins,
Defendant.

* *

STATE OF SOUTH DAKOTA)
:SS.
COUNTY OF ROBERTS)

Neil D. Long, being first duly sworn, deposes and states:

I.

That he is the duly elected Sheriff of Roberts County, South Dakota and has been serving in that capacity since January of 1975.

II.

That he was present in the courtroom during the above entitled matter during trial which commenced on June 30, 1980.

III.

That he was present in the courtroom during the testimony of Eugene Hadine, Ernest Hayes and Mathew Bluedog. That to the best of your affiant's knowledge and belief, Eugene Hadine, Ernest Hayes and Matthew Bluedog were in the courtroom only to testify that they were not present in the courtroom to hear the other two witnesses testify

Dated at Sisseton, South Dakota, this ____ day of September, 1983.

_____
Neil D. Long

Subscribed and sworn to before me this ____ day of September, 1983.

_____
David Gilbertson - Notary Public
Roberts County, South Dakota

My commission expires June 6, 1991.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS.	
COUNTY OF ROBERTS	)	FIFTH JUDICIAL CIRCUIT
State of South Dakota,	:	
Plaintiff,	:	
v.	:	AFFIDAVIT
Dennis Lufkins,	:	
Defendant.	:	

* *

STATE OF SOUTH DAKOTA)
:SS.
COUNTY OF ROBERTS)

David Gilbertson, being first duly sworn, deposes and states:

I.

That he is the duly appointed and is currently serving as the Deputy State's Attorney of Roberts County, South Dakota and has been so since May of 1975. That during the course of this time he has conducted approximately fourteen criminal jury trials.

II.

That it is his practice to have his witnesses sequestered outside the courtroom during jury trials except when testifying or in the case of law enforcement officers who are in the courtroom to preserve order.

III.

That your affiant prosecuted Dennis Lufkins for Manslaughter commencing on June 30, 1980.

IV.

That it is your affiant's knowledge and belief, he sequestered Ernest Hayes, Eugene Hadine and Matthew Bluedog outside the courtroom except when they were testifying in this matter.

Dated at Sisseton, South Dakota, this ____ day of September, 1983.

David Gilbertson

Subscribed and sworn to before me this ___ day of September, 1983.

Milton Cameron - Notary Public
Roberts County, South Dakota

My commission expires February 14, 1991.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS.	
COUNTY OF ROBERTS	)	FIFTH JUDICIAL CIRCUIT
State of South Dakota,	:	
Plaintiff,	:	
v.	:	AFFIDAVIT
Dennis Lufkins,	:	
Defendant.	:	

* *

STATE OF SOUTH DAKOTA)
:SS.
COUNTY OF ROBERTS)

Galleen Thorn, being first duly sworn, deposes and says:

I.

That she is the court reporter for the Honorable Mildred Ramynke, Judge of the Fifth Judicial Circuit of the State of South Dakota.

II.

That your affiant reporter [sic] the case of State v. Dennis Lufkins which commenced on June 30, 1980.

III.

That it is your affiant's knowledge and belief that the State's witnesses, Eugene Hadine, Mathew Bluedog and Ernest Hayes were in the courtroom only to testify and that they were not present in the courtroom to hear the other two witnesses testify.

Dated at Sisseton, South Dakota, this ____ day of September, 1983.

_____
Galleen Thorn

Subscribed and sworn to before me this ___ day of September, 1983.

_____
David Gilbertson - Notary Public
Roberts County, South Dakota

My commission expires June 6, 1991.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 83-1078-SD	)	September Term 1983
	)	
	)	
Dennis Lufkins,	)	
	)	
Appellee,	)	
	)	Appeal from the
vs.	)	United States
	)	District Court
	)	for the
Herman Sollem [sic],	)	District of
Warden, et al,	)	South Dakota
	)	
Appellants.	)	
	)	
	)	

Petitions of appellants for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

October 19, 1983